

Lostumbo (Migration) [2021] AATA 1129 (5 March 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Nicola Lostumbo

VISA APPLICANT: Mrs Franca Menozzi

CASE NUMBER: 2002078

DIBP REFERENCE(S): BCC2018/4002383

MEMBER: Russell Matheson

DATE: 5 March 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211, cl. 309.212 and cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.
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Statement made on 05 March 2021 at 11:43am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and ongoing relationship – money transfers – financial plans – sponsor’s household support to the applicant’s family – evidence of regular communication – photographs of social events – decision under review remitted

LEGISLATION

Marriage Act, 1961

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.212, 309.213, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 December 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a 62-year-old female national of Italy. She applied for the visa on 29 June 2018 based on her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the applicant is the spouse of the sponsor.
4. The review applicant appeared before the Tribunal on 3 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's daughter and son-in-law.

5. Background

6. Ms Franca MENOZZI (the applicant) is a 62-year-old Italian citizen residing in Italy.
7. Mr Nicola LOSTUMBO (the sponsor) is a 73-year-old Australian citizen, who is residing in Australia. The applicant and sponsor state that they first met at the Pasticceria Papa in Australia in July 2015.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the Departmental file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record. _

Whether the parties are in a spouse or de facto relationship

11. Clause 309.211(2) and cl.309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at the Registry of Births, Deaths and Marriages in Sydney, on 11 June 2017. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. After careful consideration of all the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the sponsor's and applicant's oral evidence and two witnesses. The Tribunal gave all the evidence provided by the sponsor and applicant and the witnesses (the sponsor's daughter and son-in-law) at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor and the witnesses to be persuasive and overall credible although there were some minor inconsistencies and the Tribunal gave the parties the benefit of the doubt.

Are the other requirements for a spouse relationship met?

16. Financial aspects

17. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.

The applicant and sponsor provided evidence of a joint Commonwealth bank account which was opened on 28 October 2016. The parties stated that the sponsor provides financial support to the applicant by transferring money to the Australian bank account of the applicant's daughter, who resides in Australia. The sponsor stated that he gives the applicant's daughter \$100 to \$200 cash each week to be sent to the applicant for her day-to-day living expenses. The parties further stated that the applicant has access to her daughter's bank account and can withdraw money from this account using a debit card that was sent to her in Italy. The Tribunal accepts that evidence of money deposits from the sponsor to the applicant's daughter's bank account was submitted. The applicant submitted evidence of her daughter's bank account statement which shows ATM withdrawals in Italy and photographic evince of the debit card given to her. The applicant's daughter also provided a statement witnessed by a JP granting use of the card in her name. She also

informed the bank her mother was using the card overseas. The Tribunal accepts that foreign currency withdrawals were made by the applicant and formal evidence was submitted to demonstrate that the applicant was granted access to her daughter's bank account. Based on the evidence presented, the Tribunal is satisfied that there is a financial aspect to the applicant's relationship with the sponsor. The Tribunal has attached some weight to this consideration.

18. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including individual income, bank accounts, future financial plans and commitments and previous employment. The sponsor gave evidence that he owns and has a mortgage not a property in Queensland and is on the aged pension and has a car loan. The applicant was aware of the sponsor's financial circumstances, resources and property ownership.
19. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
20. The parties have no joint liabilities or major assets together. There is limited evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
21. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, that the sponsor has provided significant financial support to the applicant. The Tribunal places some positive weight on this aspect of the relationship.

22. *Nature of the household*

23. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
24. The sponsor in his written submission states that before he met the applicant he was living with a friend at Leichhardt and at the time the applicant was living with her daughter and son-in-law at Ashfield since she entered Australia to study. He provided a copy of the application from an English Academy showing the Australian address of the applicant as living with her daughter in Ashfield. He further states that in September 2016 he moved into the applicant's daughters house cohabiting with the applicant and then moved with the family to another address in Greenacre after the applicant left Australia and returned to Italy. He also stated that he has been living with applicant's family in Greenacre since October 2018. The sponsor provided several documents and correspondence addressed to him at the Ashfield and Greenacre addresses including but not limited to:

- A letter from N.S.W Roads and Maritime Services;
- An Optus phone bill;
- An Australian Government pension letter;
- A letter from QBE car insurance; and
- The couple's marriage certificate.

25. The sponsor claims that he cohabited with the applicant living with her family from 16 September 2016 until the applicant's departure on 21 November 2017 at the Ashfield address and he continues to reside with the applicant's family in Greenacre. The parties and two witnesses provided evidence the sponsor is part of their family and he provides care and support to the applicant's grandchildren. They applicant and sponsor both stated that they shared the household duties and responsibilities with the applicant's family such as cooking, cleaning, gardening and shopping when they resided together in Australia.
26. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household together and that they share the responsibility for the housework when the sponsor and applicant lived together in Australia. The Tribunal places some positive weight on this aspect of the relationship.

27. Social aspects

28. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
29. There are statements from third parties about the relationship which were provided with the primary application and additional evidence is before the Tribunal. The review applicant provided additional statements (Form 888) from friends and family to the Tribunal prior to the hearing. The sponsor in his written submission spoke about the communication he has established with the applicant's relatives in Italy and the friends and family making the statements lacked detail because they had a limited education. The Tribunal accepts that the friends and family have a limited education and believe the relationship to be genuine. However, it places little weight on the statements as they give limited insight into the inception and development of the relationship over time.
30. There is a limited number of photographs provided with the primary application and a substantial number of additional photographs (dated and captioned) is before the Tribunal showing the couple's wedding and various social activities with family and friends. The applicant's daughter at the hearing was prepared to provide further photographs held on her mobile phone of the couple with family and friends in social and family settings. Having regard to that evidence, the Tribunal is satisfied the relationship is socially recognised. The Tribunal is satisfied the applicant and the sponsor represent themselves to others as being married and that others believe the relationship to be a genuine one. The Tribunal is satisfied they plan and undertake joint social activities.
31. Having regard to that evidence, the Tribunal is satisfied the relationship is socially recognised. The Tribunal is satisfied the applicant and the sponsor represent themselves to others as being married and that others believe the relationship to be a genuine one. The Tribunal is satisfied they plan and undertake joint social activities.

32. Commitment

33. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
34. The applicant and sponsor stated that they first met in July 2015 at a café in Australia. They further stated that they committed to a shared life in September 2016 cohabiting at the applicant's daughter's residence and then married in June 2017. The Tribunal accepts that

the parties are legally married as they have provided a copy of their marriage certificate. The parties have been in a committed relationship for over four years.

35. The sponsor provided evidence that he has remained committed to the relationship since the applicant left in November 2017. He further states that he wanted to be reunited with the applicant who has applied for a tourist visa on two occasions to come back to Australia, but it has been refused. The sponsor said that he would travel to Italy to visit the applicant but has been advised by his doctor due to his serious health issues it would be unwise to travel. The sponsor provided evidence of his health issues to the Tribunal.
36. Despite not being able to see each other, the applicant states that he has not allowed this to affect the couple's relationship. He further states despite the physical separation and the emotional concern regarding the visa application the couple's union continues to remain strong and they continue to provide care and support to each other through phone calls, video calls and messages. The applicant also states that he lives with the applicant's family and considers himself to be part of the family that provides great support to him and his wife.
37. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues, personal history, and future together. The evidence of communication between the parties is significant and the Tribunal considers the parties' knowledge of one another and their everyday concerns is a function of this communication.
38. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence regarding their commitment to each other plausible, persuasive and genuine.
39. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests, expectations and future.
40. The Tribunal is satisfied the parties provide each other with a strong degree of companionship and emotional support that is commensurate with a couple having a commitment to a shared life together. The Tribunal is satisfied the couple view their relationship as a long-term one.
41. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

42. Findings

43. Based on the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
44. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore, the visa applicant meets cl.309.211(2) and cl.309.221.
45. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of

the visa application was an Australian citizen who had turned 18. Therefore, the applicant meets cl.309.212 and cl.309.213.

46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

47. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).